SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 451

JEFF FORT,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT.

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THE COURT OVERLOOKED OR MISAPPREHENDED THE SCOPE AND IMPORTANCE OF THE GENERAL PROBLEM RAISED IN THIS CASE, WHERE LOWER COURTS ARE IN CONFLICT WITH THIS COURT AND WITH OTHER COURTS, AND WHERE THERE IS NO ADEQUATE REMEDY OR DETERRENT AGAINST EXCESSIVE USE OF FORCE BY THE POLICE.

A Recurring Institutionalized Problem which Requires the Attention of This Court

A 21-year old black in company with other ghetto youths upon being informed that he is under arrest re-

sponds with a mild obscenity, "bullshit". The arresting officer perceiving a "contemplated, threatened resistance" (the State's term) moves forceably against the defendant, makes a grab at him and, after a short scuffle, the defendant is subdued. The defendant is charged and convicted with resisting arrest. The underlying charge is dropped.

This scene is re-enacted daily upon the streets of our nation's black ghetto communities.

On one view

> "This is the arrest as a technique for summary punishment for an act of annoying, but not criminal, defiance—a group of young people walking down the street, a man an officer feels may look "suspicious", two men arguing on a street corner. The officer takes some action by way of asserting his authority, often ordering the individuals to move along or intervening in an argument or some similar act. Someone then does something the police officer construes as an actual or symbolic act of defiance. Then the policeman, almost subconsciously perceiving that his authority has been materially jeopardized, makes an arrest or treats the individual brutally or both, inventing a cover charge to justify the arrest and whatever else goes on in the incident. The individual is faced with the ominous prospect of criminal charges in which his story, if unauthenticated by independent witnesses, may be disbelieved and on which he may well be convicted." (Ronald M. Sohigan, "Police Abuses And Civil Liberties," *Book Week,* February 2, 1969, pp. 1, 10, a review of "Police Power: Police Abuses In New York City", Paul G. Chevigny. Pantheon.)

"The root cause of this unfortunate chain of events" we are told "is the combination of minor or almost subliminal acts of defiance of authority and the police-

man's somewhat rigid conception that he is the embodiment of authority in society. This self-conception is reenforced by police training, the extreme solidarity of the police force as an institution and society's attitudes which endow the police officer with this talismanic identity." (*id.*, p. 10)

The Kerner Commission would have it as the inevitable clash between the ghetto resident and the outside society from which he is alienated:

> "The policeman in the ghetto is a symbol not only of law, but of the entire system of law enforcement and criminal justice.
>
> "As such, he becomes the tangible target for grievances against shortcomings throughout that system: against assembly-line justice in teeming lower courts; against wide disparities in sentences; against antiquated corrections facilities; against the basic inequities imposed by the system on the poor—to whom, for example, the option of bail means only jail.
>
> "The policeman in the ghetto is a symbol of increasingly bitter social debate over law enforcement.
>
> "One side, disturbed and perplexed by sharp rises in crime and urban violence, exerts extreme pressure on police for tougher law enforcement. Another group, inflamed against police as agents of repression, tends toward defiance of what it regards as order maintained at the expense of justice.
>
> "The policeman in the ghetto is a symbol, finally, of a society from which many ghetto Negroes are increasingly alienated." (*Report of the National Advisory Commission on Civil Disorders,* Bantam Books, Ed., pp. 299-300)

In any event, whatever the cause, it is clear that this problem is in a very real sense institutionalized and one

which will be with us for some time to come and which because it involves important individual rights and social interests requires the attention of this Court.

On a basic and, indeed, sufficient level, there is involved the invasion of important individual rights: Unless the use of force is justified, defendant's person is assaulted without cause and his liberty is suspended as a cover for the unjustified force.

On a somewhat broader level there is involved the interests of society in general, because actions of this type sow the seeds of disorder:

> "In assessing the impact of police misconduct we emphasize that the improper acts of a relatively few officers may create severe tensions between the department and the entire Negro community. Whatever the actual extent of such conduct, we concur in the Crime Commission's conclusion that:
> ". . . all such behavior is obviously and totally reprehensible, and when it is directed against minority-group citizens it is particularly likely to lead, for quite obvious reasons, to bitterness in the community." (*Report of the National Advisory Commission on Civil Disorders,* Bantam Books, Ed., p. 304)
>
> "We found that violence was generated by an increasingly disturbed social atmosphere, in which typically not one, but a series of incidents occurred over a period of weeks or months prior to the outbreak of disorders. Most cities had three or more such incidents; Houston had 10 over a five-month period. These earlier or prior incidents were linked in the minds of many Negroes to the pre-existing reservoir of underlying grievances. With each such incident, frustration and tension grew until at some point a final incident, often similar to the incidents

preceding it, occurred and was followed almost immediately by violence.

"As we see it, the prior incidents and the reservoir of underlying grievances contributed to a cumulative process of mounting tension that spilled over into violence when the final incident occurred. In this sense the entire chain—the grievances, the series of prior tension-heightening incidents, and the final incident—was the 'precipitant' of disorder." (Footnote omitted—*Ibid*)

On still another level, and perhaps most important of all, there is involved the relationship between the citizen and the law, and specifically his respect for the courts:

"It is a sorry commentary on our society that this sort of behavior goes on. But much worse is that this pattern culminates in criminal litigation in which the courts become, in effect, contaminated by being made a party to the efforts of the police to vindicate real or imagined slights of their authority." (Ronald M. Sohigian, "Police Abuses And Civil Liberties," *Book Week,* February 2, 1969, *infra,* p. 10)

The present case is only one instance, but a clear one, where the police use force where force is not required or justified—where it is police action that causes the trouble. The policeman grabbed the defendant. Why? To effect the arrest? There was no showing that force was called for. Because the defendant swore once? Illinois had followed the rule, 12 A.L.R. 2d 971, 922:

"The courts almost invariably recognize and follow the general rule that words alone do not constitute an assault."

In *Civil Service Commission* v. *Oratwoski,* 123 N.E. 2d 146 (Ill. App. 1954), the court, p. 151 held:

> "An officer of the law must exercise the greatest degree of restraint in dealing with the public. He must not conceive that every threatening or insulting word, gesture, or motion amounts to disorderly conduct. It may be of such a character or so provoked or conditioned as to be fully justified. *City of Jacksonville* v. *Headen,* 48 Ill. App. 60; *Pinkerton* v. *Verberg,* 78 Mich. 573, 44 N.W. 579, 7 L.R.A. 507; *Heath* v. *Hagan,* 135 Iowa 495, 113 N.W. 342. A municipality has no authority to clothe any officer with autocratic power to order the summary arrest and incarceration of a citizen without warrant or process of law. If the municipality could, it would render the liberty of everyone of its citizens subject to the arbitrary whim of a police officer. *People* v. *McGurn,* 341 Ill. 632, 638, 173 N.E. 754.
>
> "It is apparent from this statement of the law that words addressed to an officer in an insolent manner do not without any other overt act tend to breach the peace because it is the sworn duty and obligation of the officer not to breach the peace and beyond this to conduct himself so as to keep others from so doing. He has an obligation to exercise a great degree of restraint in dealing with the public and should not permit abusive statements to so arouse him that he will commit a breach of the peace. This Oratowski did not do. He allowed Koprowski's remarks to arouse his ire and made an arrest for a fancied insult which was not in violation of the law."

In that case (p. 150) the police officer gave a traffic ticket to a man who complained to him about it, and who claimed that police officers could park illegally with impunity, while ordinary citizens were ticketed. He threat-

ened to report the officers. One officer placed him under arrest, for disorderly conduct, and reached for his arm. The man knocked the officer's hand away. The officers then forced him into a squad car, subdued him and beat him.

Although the proceedings to discharge the offending police officer are rare, (Report of National Advisory Commission, *supra,* p. 310) the incident itself is not uncommon. See the Appendix to this petition, setting out one, out of many, newspaper reports on police overaction. It is incidents like these, like the one in Detroit which triggered the riot there, which must be considered in the broadest context, and faced and resolved by the courts. But the state of the law is in confusion. There are conflicts between federal and state court decisions on the general issue. The statute involved here has been construed by a federal court to allow for resistance to an illegal arrest, but the same statute has been construed otherwise by two Illinois courts. These latter decisions are in apparent conflict with prior holdings of this Court.

This Court Should Grant Review to Resolve the Conflict Between State and Federal Decisions and the Apparent Conflict of This Case with Prior Decisions of This Court.

Why did the officer use force in this case? To effect the arrest? That argument cannot be supported by the record and it was not argued by the State. Because defendant swore once?* As set out above, under Illinois law and the common law generally, swearing to a

* Defendant argued below that the police officer grabbed him before he retorted with a common swear word of incredulity. That question was never resolved by the Appellate Court. Defendant did not rely on that factual argument here. Instead, he presented the broad issues for consideration by this Court.

police officer is neither an assault nor grounds for the use of force by the police. Yet the defendant was convicted where the record merely shows that he swung back once when he was grabbed, without cause, to be handcuffed behind his back. The Appellate Court justified the use of force on the ground that defendant had been "defiant". This could only be because defendant swore.

The decision below is in conflict with the general common law, and the interpretation that the Illinois courts have given to the state resisting arrest statute, is in conflict with prior decisions of this Court and with a decision of a federal three judge court.

Justice Jackson, for the Court, said in *United States* v. *Di Re,* 332 U.S. 581 (1948), 584:

> "One has an undoubted right to resist an unlawful arrest and courts will uphold the right of resistance in a proper case."

The *Di Re* case followed the holding of *John Bad Elk* v. *United States,* 177 U.S. 529 (1900). This is the general law of the states, "The right to resist an unlawful arrest is recognized in 45 of the 50 states." 3 Tulsa L.J. 40 (1966), 46, and the federal courts, see *Stepp* v. *United States,* 4 Cir., 1953, 207 F. 2d 909 911, relying on *Grau* v. *Forge* 209 S.W. 369 (Ky., 1919), 372, 3 A.L.R. 642, 646:

> "It is a well known principle of law that insulting words furnish no defense for an assault and battery."

This is consistent with prior Illinois law, *Oratowski, supra,* and it follows that words do not give ground for the use of force in making an arrest where no force is

required or justified.* In the *Landry* case (Reply br. pp. 8, 9) a three-judge federal court construed the Illinois resisting arrest statute and held that it allowed resistance to an illegal use of force. But in the present case, and in the *Birnbaum* case (Reply br. p. 9), the Illinois Courts have gone the opposite way. And in doing so, those decisions have relied on a statute prohibiting such resistance even though that statute was not charged (the State contends (St. Br. p. 20) Section 7-7(a) does contain a penalty. Therefore that section could have been charged). These decisions are in conflict with the *Landry* case and with the holdings of this Court and with the provisions of the Fourth Amendment. This Court should grant review and reverse the decision below, and hold that illegal police action will bar a conviction for resisting arrest.

Holding that Illegal Use of Force by the Police Will Bar a Conviction for Resisting Arrest Will Deter Illegal Police Action Where No Other Deterrent Has Been Effective.

As set out in the introduction to this petition, excessive use of force by the police can be destructive to the individual and to society. Yet to date there has not been any effective deterrent against such action.

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* The record here does not show, and the State does not claim, that defendant resisted after he was in custody. This is consistent with the limitations placed on the right to resist an illegal arrest or illegal use of force, *People* v. *McNeil*, 247 N.Y.S. 734 (1964), 736:

> ". . . an illegal arrest may properly be resisted but it does not clothe the one wrongfully detained with the right to continue indefinitely an assaultive course of action."

As set out below, if the arrest was illegal the State should be barred from convicting on resisting arrest—(within the limitations set out in the *McNeil* case).

> "Civil suits for damages filed against the individual officer have not proved adequately effective in preventing police abuse of authority." O. W. Wilson (former police commissioner of Chicago), *Police Arrest Privileges In a Free Society: Plea for Modernization,* 51 Crim. L. C. & P.S. 395, 400.

And criminal sanctions against police officers have not been successful as a deterrent, Caleb Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 Minn. L. Rev. 493 (1955), (noting that police and prosecutors do not punish themselves).

If this Court holds that illegal use of force will bar a conviction for resisting arrest, there will be an effective deterrent, under the law.

CONCLUSION.

Defendant has set out in the petition, the reply, and in this petition for rehearing, the grounds for allowing the writ to issue. This case raises issues of constitutional law and a decision of this Court is essential to the rights of individual citizens, to the fair administration of criminal justice, and the issue is timely and most important in citizen-police relations, particularly in our

ghetto communities. Police restraint, while in the performance of lawful duties, is necessary. It will take the decision of this Court to make that clear throughout the land.

Respectfully submitted,

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APPENDIX

CHICAGO DAILY NEWS
January 22, 1969

BY: MIKE ROYKO

The strong-arm of the law

One of the fascinations of the big city is that a person never knows when something exciting will happen to him.

If we knew in advance, it would ruin everything because we would all be hiding.

Take the case of a rather ordinary man named William Bamborough, 34, a balding, bespectacled, pudgy insurance man.

One night recently his orderly life suddenly got so exciting he didn't know what hit him.

He And His Wife were on their way home from an evening spent with some friends.

It was well after midnight when Bamborough pulled into a private lot near his apartment at 421 W. St. James Pl., on the mid-North Side.

Bamborough's rented space was filled. So were all the other spaces in the lot. Nothing gets a big-city man as angry as someone filching his private parking space.

Figuring the space-grabber was in a nearby building, Bamborough went looking. His wife, Rae Ellen, a suburban schoolteacher, waited in the car.

Bamborough found a clue. Behind an apartment door there were the sounds of laughter, music, and chatter. At 2 a.m., Bamborough figured, that's where the car owner was.

He Rapped On The Door and said that if the owner of the car was there, he had better come out and move it.

He recalls that he referred to the person as an "irresponsible hippy-dippy."

(Appendix)

The door opened and a girl said the car belonged to a cop who was at her party.

"I said that policeman or not, it didn't belong there," Bamborough said.

Whatever Bamborough said, that's when life got exciting for him.

He said a young man burst out of the apartment waving a badge, shouting, and began banging him around.

Bamborough said his role in the brief brawl was that of the target.

"He Pushed Me Down and started kicking. He kicked me in the head. Everything became a blur. I heard him yell, 'I'm going to kill this S.O.B.'

"Somebody yelled 'You'll kill him, stop it.' I just lay there nice and still. I was afraid he might do it."

Somebody at the party called the cops and in a few minutes two uniformed men arrived.

Mrs. Bamborough was surprised to see her husband being taken out of the building by two policemen.

He appeared to have trouble walking and one of the policemen kept repeating:

"Boy, is he stiff."

Since he hadn't been that stiff a little while ago, Mrs. Bamborough asked how he got that stiff.

A Policeman Politely Told Her that the mister had been pinched for disorderly conduct and assaulting a cop.

She drove to the Town Hall station but by then her husband had been taken to the American Hospital because he had insisted on fainting and vomiting.

She also discovered that the charges had been placed against her husband by policeman Gary Cohen, who was the young man at the party.

Officer Cohen was off duty, of course, but a policeman's work is never done.

The police records show that Cohen arrested Bamborough for "causing a disturbance in a hallway . . . and then striking a police officer with his hands, forcing officer to use reasonable force to subdue offender."

(Appendix)

Bamborough was transferred to Passavant Memorial Hospital, where he underwent emergency surgery for a ruptured spleen.

It isn't considered easy to rupture a spleen. Doctors say it takes a powerful blow to exactly the right spot. A ruptured spleen is a rarity in such violent sports as pro football or prizefighting.

Bamborough Was Lucky that policeman Cohen used only "reasonable force" in that hallway.

Had he used "unreasonable" force, Bamborough might still be bouncing.

The surgery was a success and Bamborough will survive, his doctors say.

But this new exciting chapter in his life is not over yet.

In a couple of weeks, if he's able to get around, Bamborough will go to court to stand trial for allegedly committing "battery" upon off-duty policeman Cohen.

Cohen appears healthy after his experience. But he is modest about discussing the details of his thrilling hallway arrest.

Cohen said only:

"I have no comment whatsoever to make at this time."